

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

COLUMBIA PARK GOLF COURSE,  
INC., a Washington  
corporation,

Plaintiff,

v.

CITY OF KENNEWICK, a  
municipal corporation in and  
for the State of Washington;  
JAMES R. BEAVER, Mayor of  
Kennewick; ROBERT HAMMOND,  
City Manager of Kennewick;  
and JOHN S. ZIOBRO, City  
Attorney for Kennewick,

Defendants.

NO. CV-07-5054-EFS

**ORDER GRANTING, DENYING, AND  
DENYING AS MOOT PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT  
RE: AFFIRMATIVE DEFENSE NOS.  
1, 2, 4, 5, AND 7-17**

A hearing occurred in the above-captioned matter on November 5, 2008. Plaintiff Columbia Park Golf Course (CPGC) was represented by Nicholas Kovarik. Michael Tierney appeared on behalf of Defendants City of Kennewick, James Beaver, Robert Hammond, and John Ziobro (hereinafter, collectively referred to as "the City"). Before the Court was CPGC's Motion for Summary Judgment Re: Affirmative Defense Nos. 1, 2, 4, 5, and 7-17. The City opposes the motion in large measure. After reviewing the submitted material and relevant authority and hearing from counsel, the Court is fully informed. This Order supplements and memorializes the

1 Court's oral rulings granting, denying, and denying as moot CPGC's  
2 motion.

3 **A. Affirmative Defense No. 1: failure to state a claim**

4 CPGC argues that the Complaint's causes of action are supported by  
5 the asserted facts and, therefore, this affirmative defense should be  
6 dismissed. The City responds that CPGC failed to establish the existence  
7 of valid claims.

8 The Complaint asserts the following causes of action: (1) breach of  
9 contract, (2) promissory estoppel, (3) quantum meruit/unjust enrichment,  
10 (4) intentional and fraudulent misrepresentation/bad faith, (5) tortious  
11 interference with business expectancy, (6) breach of good faith and fair  
12 dealing, (7) negligent misrepresentation, (8) vicarious liability, (9)  
13 negligence, and (10) 42 U.S.C. § 1983 violations. Because the Court  
14 previously dismissed CPGC's (a) tort claims due to CPGC's failure to  
15 comply with RCW 4.96 *et al.*'s notice of claim requirements and (b) § 1983  
16 due process and equal protection, promissory estoppel, unjust enrichment,  
17 and quantum meruit claims, the Court denies this dismissal request as  
18 moot in part. The Court dismisses this affirmative defense in all other  
19 regards because the Complaint sets forth sufficient allegations to  
20 support the remaining breach of contract, breach of the implied covenant  
21 of good faith and fair dealing, and § 1983 impairment of contracts  
22 claims.

23 **B. Affirmative Defense No. 2: lack of subject matter jurisdiction**

24 The City agrees that this affirmative defense is no longer  
25 applicable because the Court previously dismissed the tort claims.  
26 Accordingly, the motion is granted in part; affirmative defense no. 2 is  
dismissed.

1 **C. Affirmative Defense No. 4: failure to mitigate**

2 CPGC asks the Court to dismiss the City's affirmative defense of  
3 failure to mitigate because there is mitigation evidence. The City  
4 contends that there are genuine factual issues as to whether CPGC  
5 mitigated its damages because Michael Lundgren testified that other  
6 locations for the RV Project would have been profitable as well.

7 A party injured by breach of a contract has a duty to mitigate  
8 damages. *Commodity Credit Corp. v. Rosenberg Bros. & Co.*, 243 F.2d 504  
9 (9th Cir. 1957). Mitigation requires exercising ordinary care to avoid  
10 or minimize new or increased damages arising after the original event.  
11 *Bernsen v. Big Bend Elec. Co-op, Inc.*, 68 Wn. App. 427, 433 (1993); 6  
12 Wash. Prac., Wash. Pattern Jury Instr. Civ. 33.03 (5th ed. 2005). The  
13 breaching party has the burden of proving failure to mitigate. Wash.  
14 Prac., Wash. Pattern Jury Instr. Civ. 33.03.

15 The Court finds genuine factual issues exist as to whether CPGC  
16 mitigated its claimed damages resulting from alleged breaches of the CPGC  
17 Development Option Agreement and the implied covenant of good faith and  
18 fair dealing. The jury will determine whether the City met its burden  
19 of establishing failure to mitigate. CPGC's motion is denied in part.

20 **D. Affirmative Defense No. 5: statute of limitations**

21 CPGC contends the statute of limitations affirmative defense should  
22 be dismissed because there are no facts supporting this defense. The  
23 City responds that this defense should remain because it is unclear  
24 whether CPGC is relying on facts that occurred more than six (6) years  
25 prior to June 6, 2006.

26 Because the contract claims arise out of the Development Option  
Agreement, which was executed on August 16, 2005, and the 42 U.S.C. §

1 1983 impairment of contract claim arises out of the City's June 6, 2006  
2 conduct, this February 12, 2007 lawsuit is timely. See RCW 4.16.040 (six  
3 years for written contract); *Rose v. Rinaldi*, 654 F.2d 546, 547 (9th Cir.  
4 1981) (three years for § 1983 action in Washington). CPGC's motion is  
5 granted in part; the statute of limitations defense is dismissed.

6 **E. Affirmative Defense Nos. 7 and 8: waiver and estoppel**

7 CPGC asks the Court to dismiss the City's waiver and estoppel  
8 affirmative defenses because there is no evidence to support them. The  
9 City opposes this request, highlighting that it presented evidence on  
10 both of these arguments in connection with the pending summary judgment  
11 motions.

12 Because there are genuine factual issues as to (1) whether CPGC is  
13 estopped from arguing that the RV Project received approval for the golf  
14 course location given Lee Kerr's statements and silence at the May 2006  
15 city council meeting, and (2) whether CPGC waived the right to proceed  
16 with litigation through its post-June 6, 2006 conduct, these affirmative  
17 defenses are retained for trial. The motion is denied in part.

18 **F. Affirmative Defense No. 9: qualified and absolute immunity**

19 CPGC contends the City's asserted qualified and absolute immunity  
20 defense must be dismissed. The Court grants this request and dismisses  
21 this affirmative defense because the City and individual Defendants - who  
22 are city officials sued in their official capacity - are not entitled to  
23 qualified or absolute immunity. See *Brandon v. Holt*, 469 U.S. 464, 471-  
24 73 (1985) (citing *Monell v. Dep't of Social Servs. of New York*, 436 U.S.  
25 658, 701 (1978)); *Ying Jing Gan v. City of New York*, 996 F.2d 522, 529  
26 (2d Cir. 1993).

**G. Affirmative Defense No. 10: failure of consideration**

1 CPGC contends this affirmative defense should be dismissed because  
2 CPGC performed its Development Option Agreement obligations, with the  
3 exception of constructing the RV Project, which was prevented by the  
4 City. The City responds that CPGC failed to perform its obligation.

5 Failure of consideration, or failure of performance, is an  
6 affirmative defense when there is an agreement, but then for some reason  
7 the promised performance fails. 3 Williston on Contracts § 7:11 (2008).  
8 The burden of proving this defense is on the asserting party. *Id.* The  
9 Court is presently unsure how this affirmative defense applies here.  
10 Accordingly, the Court denies the request at this time.

11 **H. Affirmative Defense No. 11: unclean hands and laches**

12 Because these affirmative defenses relate to the previously-  
13 dismissed unjust enrichment and quantum meruit claims, the Court denies  
14 this request as moot.

15 **I. Affirmative Defense No. 12: accord and satisfaction**

16 CPGC seeks to dismiss the accord and satisfaction affirmative  
17 defense because the negotiations following the City's termination of the  
18 RV Project never culminated in a resolution. The Court denies this  
19 request because, as discussed in the November 2008 summary judgment  
20 order, genuine issues of material fact exist as to whether an accord and  
21 satisfaction occurred.

22 **J. Affirmative Defense No. 13: agreement to arbitrate**

23 The parties agree that this affirmative defense is not applicable;  
24 accordingly, the Court dismisses the agreement-to-arbitrate affirmative  
25 defense.

26 ///

**K. Affirmative Defense No. 14: assumption of risk**

Again, because the parties agree that this affirmative defense is no longer applicable, the Court dismisses the assumption-of-risk affirmative defense.

**L. Affirmative Defense No. 15: doctrine of privilege**

CPGC asks the Court to dismiss the doctrine of privilege as an affirmative defense because absolute and qualified privilege protect a defendant from liability for defamatory statements - this is not a defamation case. The City contends that the privilege doctrine applies in more than just defamation cases and it is pertinent here given that CPGC is arguing that the City acted in bad faith when it decided not to allow an RV park at the golf course location - a decision made in the City's proprietary capacity as the owner of the golf course and park.

The Court is not persuaded by the City's argument. The case the City relies upon - *Quadra Enterprises, Inc. v. R.A. Hanson Co., Inc.*, 35 Wn. App. 523 (1983), - loosely used the term "privilege." It did not hold that the privilege doctrine applies outside of defamation cases. The doctrine's purposes as discussed in *Bender v. City of Seattle*, 99 Wn. 2d 582, 600-01 (1983), and *Demopolis v. Peoples National Bank of Wash.*, 59 Wn. App. 105 (1990), indicate that the privilege doctrine only applies to defamation cases. Accordingly, the Court grants CPGC's motion and dismisses the affirmative defense of doctrine of privilege.

**M. Affirmative Defense Nos. 16 & 17: statute of frauds & ultra vires**

CPGC seeks to dismiss both of these affirmative defenses. The City contends they are interrelated and should remain because CPGC is alleging the existence of oral contracts entered into by City officials.

1 The Court dismisses the statute of frauds affirmative defense  
2 because the writing requirement is satisfied by the written sublease and  
3 the Development Option Agreement. See RCW 19.36.010. In addition, full  
4 and partial performance are exceptions to the statute of frauds. *Puget*  
5 *Sound Pulp & Timber Co. v. O'Reilly*, 239 F.2d 607, 611 (9th Cir. 1956);  
6 *Clements v. Book*, 112 Wn.2d 217, 225-26 (1920). CPGC partially performed  
7 its sublease and Development Option Agreement requirements.

8 Lastly, the Court grants and denies, with leave to renew, the  
9 request to dismiss the ultra vires affirmative defense. The affirmative  
10 defense is dismissed as it relates to the City Council, yet retained to  
11 the extent that the City is free to argue at trial that a City employee  
12 was acting ultra vires.

#### 13 **N. Conclusion**

14 For the above given reasons, **IT IS HEREBY ORDERED:** Plaintiff CPGC's  
15 Motion for Summary Judgment Re: Affirmative Defense Nos. 1, 2, 4, 5, and  
16 7-17 (**Ct. Rec. 191**) is:

- 17 • **GRANTED** (the following affirmative defenses are dismissed: (2)  
18 lack of subject matter jurisdiction, (5) statute of  
19 limitations, (9) qualified and absolute immunity, (13)  
20 agreement to arbitrate, (14) assumption of risk, (15) doctrine  
21 of privilege, and (16) statute of frauds);
- 22 • **DENIED** (the following affirmative defenses are retained: (4)  
23 failure to mitigate, (7) waiver, (8) estoppel, (10) failure of  
24 consideration/performance, and (12) accord and satisfaction);
- 25 • **DENIED AS MOOT** ((11) unclean hands and laches);
- 26 • **GRANTED AND DENIED AS MOOT IN PART** ((1) failure to state a  
claim); and

- (17) ultra vires is **GRANTED** (City is bound by City Council's action) and **DENIED** (question of fact whether City is bound by employee's conduct).

**IT IS SO ORDERED.** The District Court Executive is directed to enter this Order and provide copies to counsel.

**DATED** this 7<sup>th</sup> day of November 2008.

\_\_\_\_\_  
S/ Edward F. Shea  
EDWARD F. SHEA  
United States District Judge

Q:\Civil\2007\5054.affirm.def.wpd